NO. 2752

. . . . IN THE . . . .

United States Circuit Court of Appeals

For the Ninth Circuit

EMERY VALENTINE,

Plaintiff in Error.

vs.

CHARLES A. QUACKENBUSH, Doing Business as the JUNEAU CONSTRUCTION CO.,

Defendant in Error.

UPON WRIT OF ERROR TO THE DISTRICT COURT FOR ALASKA, DIVISION NUMBER ONE

Brief for Plaintiff in Error

J. H. COBB.
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STATEMENT OF THE CASE

This is an Action brought by the defendant in Error, hereinafter styled plaintiff, against the plaintiff in Error, hereinafter styled defendant, for a balance alleged to be due on a building contract. The contract was made between C. A. Quackenbush, T. A. Bush and R. J. Mill, a firm doing business as the Juneau Construction Co., and the defendant, on or about April 1st, 1913. Bush and Mill afterwards retired from the firm and the business was continued by plaintiff alone.

The plaintiff stated his cause of action as follows:

> "That between the 1st day of April, 1913, and the 1st day of April, 1914, the said Juneau Construction Company, at the special instance and request of the defendant, furnished to the defendant all of the lumber, materials, supplies and labor used (1½) in the erection and remodeling of three certain buildings belonging to the defendant in the town of Juneau, Alaska, and that the cost of said lumber, materials, supplies and labor was $27,931.59, and that the defendant herein agreed to pay to the said Juneau Construction Company the cost of said lumber, materials, supplies and labor used in the erec-

tion, construction and remodeling of said buildings and further agreed to pay to the Juneau Construction Company in addition thereto ten per cent (10%) of the cost of said lumber, materials, supplies and labor used in the erection, construction and remodeling of said buildings in compensation for the services of said Juneau Construction Company in Superintending the erection, construction and remodeling of the said buildings, and that the said Juneau Construction Company, did superintend the construction, erection and remodeling of said buildings, and that there was due to the said Juneau Construction Company on account of the said lumber, materials, supplies and labor used in the erection, construction an dremodeling of said buildings and on account of superintending the construction, erection and remodeling of said buildings $31,953.29.

II.

"That no part of the said sum of $31,953.29 has been paid except the sum of $26,774.32 and that there is now due and owing of and from the defendant to the plaintiff the sum of $5,020.92 with interest thereon at the rate of eight per cent (8%) per annum from April 1, 1914."

(Rec. p. 2)

The defendant's answer so far as material alleged:

"That on or about the 1st day of April, 1913, the defendant entered into a contract with the said plaintiff, Bush and Mill, under their partnership name of the Juneau Construction Company wherein and whereby the said Construction Co. undertook and agreed to superintend the erection of two certain buildings for defendant (4) in said town, according to plans then and there furnished said company by defendant, which buildings are the same as those mentioned in the complaint herein; that by the terms of said contract said company undertook to employ all needed labor at not to exceed the regular going wages in Juneau, and to purchase all needed material at the market price less the dealer's discount, which said company represented that it could and would obtain by virtue of the business in which it was engaged, and that said discount would more than equal the compensation stipulated for said company as hereinafter stated; that defendant should furnish the said company from time to time as needed and as the work progressed, the funds necessary to pay for said labor and material, and the said company agreed to keep an accurate account of all such moneys, and of all expenditures made therefrom and furnish the

same to defendant accompanied by original vouchers therefor; and it was further stipulated that said company should have and receive upon the completion of said work, a sum equal to ten per cent of the total cost of the labor and material employed, bought and paid for through it. That on or about November 1st, 1913, by a contract by and between plaintiff and defendant, plaintiff undertook the repairing and remodeling of a certain other building for defendant on the same terms and contditions as set forth in the first contract.

III.

"That after the said company had entered upon the performance of its said contract the said Bush and Mill retired from said firm (the precise date of which is unknown to defendant), and by some arrangement between themselves (the precise nature of which is unknown to defendant) plaintiff assumed all the duties and liabilities of said firm but the defendant never at any time released said partnership or any member thereof from any obligation to him under said contract.

"That between the 10th day of May, 1913, and the 15th day of January, 1914, both inclusive the defendant furnished the said company and plaintiff not only with the sum of $25,932.37

shown and (5) admitted in the bill of particulars filed herein, but in addition thereto with the further sum of $2,500.00 with which last-mentioned sum plaintiff failed to credit defendant, and making a total of $28,432.37 furnished and paid said company under said contract.

V.

"That upon the completion of the said work under said contract plaintiff demanded of the defendant the payment of a further sum of upwards of $6,000.00 for a balance alleged by plaintiff to be due him; that defendant was ready and willing to pay any balance actually due, and has at all times been so ready and willing, but he requested plaintiff give him a full account with original vouchers of the moneys he had received from defendant so that a correct balance could be struck, but the plaintiff failed and refused so to do, but did furnish defendant with copies, or purported copies of various bills and pay-rolls but incapable of verification, but which showed a purported balance due the plaintiff of upwards of $6,000; which sum defendant declined to pay, on the ground that the same was incorrect, contained many items wrongfully charged to the defendant, and was not accompanied by vouchers. The bill of particulars filed herein is a substantial copy of said

pretended account, except that by the addition and subtraction of various items and changed in the amounts of others the purported or claimed balance has been reduced.

VI.

"Referring to the bill of particulars filed herein defendant alleges that he is not liable for the items $539.40 "plan for block" or for any sum whatsoever therefore, for that the defendant did not furnish any such plan, and is not entitled to any charge therefore.

VII.

"Defendant further alleges upon information and belief, that the prices shown on the several accounts annexed to and contained in said bill of particulars, and the wages shown on the payrolls, are not the actual prices and wages paid by the plaintiff or said construction company, but in each instance represents a larger amount than was actually paid; but if the plaintiff or said construction company did pay the prices and wages therein shown, then defendant alleges that the amounts so paid were largely in excess of the amount for which said material could have been purchased, and said labor employed, and that plaintiff and the construction company wrongfully and intentionally increased the cost

of said work for the purpose of increasing the compensation they were to receive.

"Defendant further alleges that the material shown and charged to him in said bill of particulars is largely in excess of the material actually purchased and used by the said construction company and plaintiff in the prosecution of said work.

IX.

"That defendant has no means of ascertaining and stating the true and correct account between the construction company and himself under said contract, for the reason that all the material was purchased, and all the labor employed through said construction company and plaintiff, but he believes and therefore alleges that upon a true and correct statement of such account, including the compensation stipulated for the said construction company, a balance will be found in defendan't favor for a large sum."

(Record pp. 6-10.)

The reply so far as material alleged:

"Referring to paragraph II of said Affirmative Defense and Cross-Complaint, the plaintiff admits that on or about the 1st of April, 1913, the defendant entered into a contract with the plaintiff, Bush and Mill under their partner-

ship name of the Juneau Construction Company, wherein and whereby the said Construction Company, undertook and agreed to superintend the erection of two certain buildings for the Defendant in said town; denies 'according to the plans then and there furnished said company by defendant'; admits that by the terms of said contract the Juneau Construction Company undertook to (9) employ all needed labor at not to exceed the regular going wages in Juneau and to purchase all needed material at the market price less the dealer's discount which said company represented that it could and would obtain by virtue of the business in which it was engaged; denies that the plaintiff agreed that said discount would more than equal the compensation stipulated for the plaintiff as hereinafter stated; admits that it was agreed that the defendant should furnish the plaintiff from time to time as needed, and as the work progressed, funds necessary to pay for said labor and material and that said company agreed to keep an accurate account of all such moneys and all expenditures made therefrom and furnish the same to defendant accompanied by original vouchers therefor; admits that it was further stipulated that said company should have and receive upon the completion of said work a sum of money equal to ten per cent of the total cost of the labor and mater-

ial employed, bought, used and paid for by or through it or the defendant, and admits all the other allegations in said paragraph contained.

III.

"Referring to paragraph III. of said Affirmative Defense and Cross-Complaint, plaintiff admits that after the said company, the Juneau Construction Company, had entered upon the performance of its said contract that the said Bush and Mill retired from the firm and that the plaintiff assumed all of the duties and liabilities of the said firm; denies each and every other allegation therein contained and alleges the facts to be that the assumption by the plaintiff as the successor in interest of the said partnership of the obligations of the said contract with (10) the defendant was done with the full knowledge and consent of the defendant.

IV.

"Referring to paragraph IV., VI., VIII and IX. of the said Affirmative Defense, and Cross-complaint, the plaintiff denies each and every other allegation of fact therein contained.

V.

"Referring to paragraph V of said Affirmative Defense and Cross-complaint, the plaintiff

admits that upon the completion of the said work under the said contract, he demanded of the defendant the payment of a further sum of upwards of $6,000 as and for a balance due him; admits that the defendant requested plaintiff to furnish him a full account, with the original vouchers, of the moneys he had received from the defendant; admits that the same showed a balanec due the plaintiff from the defendant of upwards of $6,000 and denies each and every other allegation of fact therein contained.

VI.

'Referring to paragraph VIII. of said Affirmative Defense and Cross-complaint, the plaintiff admits that none of the sundry accounts therein referred to were paid for or through the Juneau Construction Company or the plaintiff, but denies each and every other 'allegation of fact therein contained.' "

It will thus be seen that all the terms of the contract as plead by the defendant **were admitted by the plaintiff** except the allegations: "according to plans then and there furnished said company by defendant," and "that the plaintiff denies said that discount (the dealers discount) would more than equal the compensation stipulated for plaintiff as hereinafter stated." These two allegations are denied, but all other allegations of defendant relat-

ing to the terms of the contract are admitted; and the two items denied became upon the trial, wholly immaterial, as we shall show.

The terms of the contract sued upon them were in sustance as follows:

1st. Plaintiff was to superintend the erection of two certain buildings and the repairing and remodeling of a third.

2nd. Plaintiff was to purchase all needed materials, and hire all labor.

3rd. Defendant was to advance the plaintiff from time to time as needed the necessary funds to pay for said material and labor.

4th. The plaintiff was to keep an accurate account of said moneys, and of all expenditures therefrom and furnish the same to defendant accompanied by original vouchers.

5th. Upon completion of said work the plaintiff was to receive as compensation for his services a sum equal to 10 per cent. of the total cost of the labor and material, employed, bought and paid through him.

This Is the Contract Admitted on the Pleadings

Upon the trial it developed and plaintiff admitted that defendant had paid the plaintiff $26,932.37 and the court so instructed the jury. (Rec. 67.) It further developed and the court so instructed the jury that there were overcharges to the defendant aggregating $766.83. (Rec. 64).

It further developed that the defendant had hired other independent contractors to put in the heating plant, the electric wiring, the painting, and paid for it directly and without supervision thereof by plaintiff; these independent contracts amounting to $5,617.20.

It further developed that plaintiff had charged defendant, in addition to the 10 per cent. stipulated in the contract, a further sum of 2½ per cent. for plans of building $666.82.

There was a trial to a jury which resulted in a verdict for plaintiff for $3,706.07, with interest from May 1st, 1914, (Rec. 16) upon which judgment was entered.

The defendant assigned errors, and sued out a writ of error to this court.

A bill of particulars, (not in the record because not material), was furnished by the plaintiff. On the trial, after correcting the credits which plaintiff had failed to give defendant for money advaced and after excluding as the court did, the erroneous charges, duplications, etc., aggregating $766,85, there was no serious controversy left except over two items, to-wit:

1st. A charge of $666.82 or 2½ per cent. on costs of building "for plans."

2nd. A charge of $561.82, being 10 per cent. on the aggregate cost of work done by independent

contractors, not superintended by plaintiff, and not within the terms of the contract.

3rd. Defendant further contends that the Court should not have allowed interest under the contract until a balance was ascertained and struck.

I.

The first point is raised by the First, Third, and Sixth Assignments of Error, which are as follows:

> "The Court erred in admitting in evidence the testimony of the plaintiff tending to show that the contract between the Juneau Construction Company and the plaintiff provided for a commission of 2½% of the cost of the Valentine building 'for plans' in addition to the 10% of such costs for the services of the said company.'

III.

> "The Court erred in refusing the prayer of the defendant to instruct the jury as follows:
>
> > 'In arriving at your verdict herein, you will wholly disregard the charge made against Mr. Valentine by the plaintiff for $666.82 for plans of block. There is no evidence that the plaintiff expended any money or was put to any cost on account of such plans, and the 2½% on the total cost of the building, which the plaintiff claims he

was entitled to, to make up such item, is not embraced in the terms of the contract. ''

VI

''The Court erred in instructing the jury as follows:

'Plaintiff claims that in addition to his claim for material and labor, and for percentage thereon, he is entitled to 2½% on the cost of the new Valentine building for the work and labor of preparing plans for the work of construction. Plaintiff says that defendant agreed that the 2½% was a reasonable sum to charge for the plans, nad that it should be so charged, whereas the defendant claims that the contract was to the effect that if plaintiff did not do the work of building he was to have 2½% but if he did get the job of superintending the building, he was not to charge anything for the plans.' ''

'Now you have heard the evidence on both sides, and it is for you to decide from that evidence what the contract was as to the plans. If you decide that the contract was to pay 2½% of the cost of the building, including the 'sundry items' and allow that amount also to the plaintiff; if you decide that the contract was as Mr. Valentine al-

leges it to have been, then you will make no addition for or on account of the plans.' ''

The bill of exception shows (Rec. pp. 60, and 66-67), that the defendant seasonably requested the instructions set out in the III Assignment and seasonably excepted to the instructions quoted in the VI. Assignment, and the request was refused.

The bill of exception further shows that the plaintiff testified, that he added 2½% per cent of the total cost of the building in addition to the 10 per cent. "for the plans'," that this was the usual and customary charge of architects for such services, and that defendant agreed to pay this 2½ per cent. as a part of the contract sued upon, and the defendant moved to strike all testimony relating to the plans and agreement to pay the 2½% per cent. which motion was denied, and defendant excepted. (Rec. 27, and 25-27).

ARGUMENT

In the first place it will be observed that the item of $666.82 is not an advance of money, made by the plaintiff which defendant was to repay. It is a part of his compensation for services under his contract with defendant. Is he entitled to it under the undisputed terms of his contract? Certainly there was, under the pleading no question raised, or issue made as to what plaintiff was to be paid.

It was 10 per cent. of the total cost of the work. The plaintiff plead it—the defendant plead it. The plaintiff testified as follows:

Q. Now, Mr. Quackenbush, if you are telling the jury the facts about that, when you drew your complaint herein why didn't you sue for 12½% per cent of the total cost of the building, under your alleged contract?

A. Because I was entitled to ten per cent of the total cost of the building.

Q. And 2½%, you say, for the plans?

A. Yes, sir.

Q. That makes 12½ per cent, doesn't it?

A. Yes, sir.

Q. Why didn't you sue for that? (27-13).

A. Well, itmake s a little different balance, I think. That ten per cent, that is for superintendence, and I am entitled to ten per cent for superintendence on every bit of work that I done and material furnished; and the 2½ per cent is much less than my other commission.

Q. You are charging 2½ per cent in addition, then, to the ten per cent you are charging on the work done and material furnished?

A. I am asking for 2½ per cent of the total cost of the Valentine building, not the old building. (Testimony of Charles A. Quackenbush).

Q. Answer the question—you are also

charging 2½ per cent in addition then to the 10 per cent?

A. Certainly—regular architect's fees.

Q. So in addition to the ten per cent of the total cost of the building so far as labor and material is concerned, you are charging Mr. Valentine 2½ per cent on your commission of ten per cent and adding it to the other, is that right?

A. That is for separate services altogether.

Q. Answer the question—is that what you are doing?

A. I charged Mr. Valentine, as I stated before, 2½ per cent for the plans of the Valentine block, and I am asking 10 per cent commission on the total work done.

Q. Does that ten per cent—the amount you calculate your 10 per cent on, include the cost of the plans?

A. It does not.

Q. Does the 2½ per cent you calculate for architect's plans, include your commission on the building?

A. Does it include—

Q. It is calculated on your 10 per cent commission as well as the other cost?

A. Certainly not. (28-14).

Q. What is it calculated upon?

A. It is calculated upon the net cost of the building, which is customary in architect's fees.

Q. Customary?

A. The world over, any place I have been.

The defendant testified that he furnished Mr. Mill (who was dead at the time of the trial) a set of plans of the building, and there were minor changes to be made, and Mill for the Construction Company agreed to make all such alterations, etc., and superintend the work for 10 per cent. If the Construction Company furnished plans alone, it was to charge 2½ per cent.

As this was an additional compensation sought to be received under the contract, the motion of the defendant to strike the testimony should have been granted; and the motion having been denied, the court should have instructed the jury to disregard it. The rulings of the court complained of, violate fundamental rules of law and proceedure. A plaintiff suing upon a contract, must recover according to the terms of the contract. He cannot add to it, by showing that an additional charge "is customary the world over." If he contracts for 10 per cent he cannot recover for 12½ per cent by showing that 2½ per cent is customary for a part of the services rendered. So if he sues upon and pleads a contract for 10 per cent compensation he cannot prove and recover upon a contract for 12½%. The allegata and Probata must agree. Much less can he admit the defendant's allegations that the contract for

compensation was 10 per cent, and prove 12½ per cent. His admission on the record estops him.

See 9 Cyc. 748-752, where these fundamental principles are clearly stated.

II.

The second point is raised by the IV. and V. Assignments which are as follows:

IV.

"The Court erred in refusing the prayer of the defendant to instruct the jury as follows:

'You will also disregard the charge made against Mr. Valentine of $561.72 for 10% on sundry accounts, as that item is not within the terms of the contract as admitted by the plaintiff.' "

V.

The Court erred in instructing the jury as follows:

'Jlaintiff claims that the contract was that he should have a commission of 10% upon the total cost of the building; while defendant contends that the contract was that the plaintiff was only to have a commission of 10% upon such material and labor as was purchased and furnished by plaintiff, and defendant says that the ac-

counts called 'sundry items' (which you will find on page 2 of the bill of particulars) amounting to $5,617.20, are materials and labor not furnished by or through the plaintiff, and that plaintiff had nothing to do with them, but that the defendant transacted that business himself, and that plaintiff is not entitled to any commission thereon. Now you are the judges as to what this contract was. If you find from a preponderance of the evidence that plaintiff was to have 10% on the cost of those materials, labor, etc., furnished by him, and 10% on the value of the 'Sundry accounts'; but if you find that the contract was that he was only to have ten per cent on such material and labor as was furnished and supervised by him, the nyou must not allow him any percentage on the 'sundry items'—in other words, unless you find fro mthe preponderance of the evidence that the defendant Valentine agreed to pay to the Construction Company 10% upon the bills of the American Paint Co., Alaska Electric Light & Power Co., Juneau Iron Works, Marshal and Newman, and the Telephone Co., (65) (known as 'sundry accounts), you will allow no percentage thereon; That is to say, the question for you to determine is whether or

not the contract as made between the plaintiff and the Construction Co. provided for Valentine paying the Construction Co. 10% on these, 'sundry accounts,' and upon that issue the burden of proof is upon the plaintiff." (Rec. 71-72).

The bill of exception shows, (Rec. 60 and 66-67) that defendant seasonably requested the instruction quoted in the IV. Assignment, that it was refused and exception taken; that the court gave the instruction quoted in the V. Assignment and the defendant excepted.

It developed in the evidence, not in the pleading, that plaintiff was claiming $561.72 as a commission of 10% upon $5,617.20, the agregate of the cost of a heating plant, electric light plant, telephone wiring, and painting, all admittedly work done by other contractors, and paid for directly by the defendant—work which plaintiff was never employed to superintend or pay for. By the rulings of the Court complained of plaintiff was allowed to recover this item.

It is within the terms of his contract?

Defendant alleged (Rec. 6) that the Construction Company was to "receive upon the completion of said work, a sum equal to 10 per cent of the total cost of the labor and material, employed, bought and paid for through it." Defendant not only does not deny this allegation but admits it. (Rec. 12).

Yet the Court left it to the jury to say whether

or not the contract was that defendant was to pay this commission on work never superintended by plaintiff, never paid for by him ,and for which he was in no manner responsible. In short the court submitted to the jury an issue not only not made by the pleadings, but expressly excluded by the pleadings.

Grafton Hotel Co. vs. Walsh, 228 Fed. 7-10.

III.

The third point is raised by the VII and VIII. Assignments as follows:

VII.

"The Court erred in overruling the motion of the defendant to set aside the verdict, because contrary to and not authorized by the instructions of the Court in this; that the verdict allowed interest from May 1st, 1914. (66).

VIII.

"The Court erred in entering judgment on the verdict for interest from May 1st, 1914, because such allowance of interest is contrary to the law of Alaska in an action on mutual account until a balance is struck.

(Rec. 74).

The jury returned a verdict for the plaintiff for the sum of $3,706.07 with interest from the 1st day of May, 1914. (Rec. p. 16).

Upon this verdict a judgment was entered for $3,982.77.

This verdict and judgment was contrary or at least unauthorized by instructions of the Court (Rec. 67-68). It was also contrary to the law.

It is manifest from the record in this case that the defendant had advanced to the plaintiff a sum somewhat in excess of the moneys expended by the plaintiff in the prosecution of the work; that the plaintiff had failed to keep account of the expenditures of money advanced by the defendant as he was required under his contract, and had so conducted the accounting under his contract that he defendant could not settle any balance, if one existed, and until that balance was ascertained and struck the plaintiff was not entitled to interest.

Sec. 684, Complied Laws of Alaska provide:

> "The rate of interest in the District shall be eight per centum per annum on money due upon the settlement of mutual accounts from the date the balance is ascertained."

In conclusion we respectfully submit that the judgment should be resersed because:

1st. Under the contract plead the plaintiff was entitled to 10 per cent commission and not upon 12½ per cent commissions upon the cost of the Valentine building.

2nd. Because under the contract the plaintiff was entitled to commissions only upon the work

superintended by him and only to the extent of the cost of labor hired and materials purchased and paid for by him, and not upon the cost of incidental work done by independent contractors with which plaintiff had no connection.

3rd. Because the plaintiff was not entitled either under instructions of the court or under the law, to the interest allowed by the verdict and entered in the judgment; and we ask that the judgment be reversed and the cause remanded.

J. H. COBB,
Attorney for Plaintiff in Error.